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No. 05-409

IN THE
Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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Respondents "acknowledge" (Opp. 10) the existence of a square circuit split on the first question presented in the petition. They also concede that the Court has recently agreed to review the second question presented on the scope of SLUSA preemption, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371. Respondents nonetheless argue that the jurisdictional question is not worthy of the Court's attention, and that the decision below did not turn on the Seventh Circuit's resolution of the preemption question, which, according to respondents, was mere dictum. Respondents seem to think this Court granted certiorari in *Dabit* absent a true circuit conflict.

Neither position has merit. The Court should grant the petition to consider the appealability of remand orders following findings that SLUSA does not preclude a lawsuit, which is not at issue in *Dabit*. At the very least, the Court should hold the petition pending resolution of *Dabit*.

I. The Circuits Are In Acknowledged Conflict Over The Appealability Of Remand Orders Under SLUSA

In *Kircher I*, the Seventh Circuit held, contrary to the prior holdings of two other circuits, that a district court's remand order based on a conclusion that SLUSA did not preempt the plaintiff's claims, and that the court therefore lacked subject-matter jurisdiction, was immediately appealable. Respondents concede that "the decision below conflicts with the Second Circuit's decision in *Spielman* and the Ninth Circuit's decision in *Abada* (which was adhered to by the same court in *United Investors*)." Opp. 10.

Respondents nevertheless suggest that the Court should not grant certiorari because the Second and Ninth Circuits might reverse themselves in light of the outcome in *Kircher I*. That suggestion reflects the most baseless form of wishful thinking. There is no reason to suppose that litigants in the Second and Ninth Circuits will seek appellate review of SLUSA remand orders despite clear circuit precedent forbidding such review; that both circuits will decide to hear a case presenting the jurisdictional question

en banc; and that both circuits will reverse their own precedent because of the result in *Kircher I*. Indeed, respondents cite no instance in which the circuits have ever before self-resolved a conflict in such an improbable fashion. The Second and Ninth Circuits squarely, and correctly, rejected the reasoning of *Kircher I*. They found it clear that SLUSA's removal provision[1] authorizes removal only of actions that fall within the scope of subsection (b), SLUSA's preemption provision. *See, e.g., Spielman*, 332 F.3d at 123 (stating that "SLUSA's removal provision makes removable any class action preempted by" § 78bb(f)(1)(A), SLUSA's preemption provision, and that "Congress could not have spoken more clearly").

The Second and Ninth Circuits concluded that a remand based on a failure to meet the requirements of SLUSA's preemption provision was also a decision that SLUSA's removal provision had not been satisfied, and thus was indisputably a remand for lack of subject-matter jurisdiction.[2] As the Ninth Circuit explained in *United Investors*, "the district court's subject matter jurisdiction depended entirely on SLUSA's preemptive scope. As such, the district court's jurisdictional and merits analyses were inseparably connected: in order to establish jurisdiction over [the defendant's] motion to dismiss, the district court

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[1] That provision permits removal of "[a]ny covered class action brought in any State court involving a covered security, *as set forth in subsection (b)*." 15 U.S.C. § 77p(c) (emphasis added); *accord id.* § 78bb(f)(2).

[2] *See Spielman*, 332 F.3d at 125 (SLUSA completely preempts those claims within the scope of its preemption provision; "[i]f a district court determines the action is *not* a 'preempted class action' and, therefore, removal was improper, the district court lacks subject matter jurisdiction to further entertain the action"); *id.* at 131-32 (Newman, J., concurring) (preemption and the existence of subject-matter jurisdiction "are the opposite sides of the same coin"); *Abada*, 300 F.3d at 1119 ("[T]o decide whether it had subject matter jurisdiction, the district court was required to decide whether Abada's claims were completely preempted by SLUSA.").

would have had to decide [the defendant's] SLUSA preemption claim in its favor." 360 F.3d at 966.

Kircher I, on the other hand, simply ignored the crucial language in SLUSA's removal provision – "as set forth in subsection (b)" – and held that, to determine whether an action was properly removed, a federal court had to consider one requirement for preemption – whether the action was a covered class action, *see* Pet. App. 14a – but not the other requirements. The Seventh Circuit offered no justification for differentiating the various prongs of SLUSA's preemption test when the removal provision draws no such distinction. *Kircher I* argued that whether a lawsuit is "in connection with the purchase or sale of a covered security" is a "substantive decision" that Congress "authorized" federal courts to make. *Id.* However, whether an action is a "covered class action" is no less a "substantive decision" that Congress "authorized" federal courts to make. Federal courts' "authority" to decide the substantive question stems from their jurisdiction to determine their own subject-matter jurisdiction. *See* Pet. 19-20; *Abada*, 300 F.3d at 1118.

Kircher I is flawed in other respects as well. It asserted that the district courts had found removal proper, despite each of those courts' unambiguous statements to the contrary. *See* Pet. 17-18. It also relied on the language of SLUSA's remand provision, *see* Pet. App. 13a, which applies only when the remand is based on a finding that the action, though it meets the requirements of SLUSA's preemption provision (and therefore of SLUSA's removal provision), falls within the specific exceptions to preemption enumerated in subsection (d) (preserving, for example, class actions brought by States and/or their political subdivisions). *See* 15 U.S.C. § 77p(d)(4) ("if the Federal court determines that the action may be maintained in State court *pursuant to this subsection*, the Federal court shall remand such action to such State court") (emphasis added). No other court of appeals has endorsed the Seventh Circuit's erroneous interpretation of SLUSA's removal provi-

sion, and there is no reason to think the Second and Ninth Circuits will both reverse course and adopt the Seventh Circuit's minority view. Moreover, there is no prospect that the Seventh Circuit will reconsider *Kircher I*, because not only did it follow that decision in *Disher*, *see* 419 F.3d at 652, but it has recently held that *Kircher I* merely followed settled circuit precedent. *See Erb v. Alliance Capital Mgmt., L.P.*, 423 F.3d 647, 652 (7th Cir. 2005).

Nor is there any reason to expect a reversal in position by the Second or Ninth Circuit because of the Supreme Court's decisions in *Scarborough* and *Kontrick*. Those cases have no bearing on the analysis of *Spielman* or *Abada*. *Kontrick* held that a timing rule regarding when a complaint objecting to a debtor's discharge had to be filed was not "jurisdictional" in the sense of affecting the court's subject-matter jurisdiction (as both sides in the case conceded), and that Kontrick could therefore waive his defense based on that rule. *Scarborough* similarly concluded that a timing rule for fee applications did not affect subject-matter jurisdiction. By contrast, the requirements of SLUSA's preemption and removal provisions are jurisdictional in the strict sense: if those requirements are not met, a federal court lacks subject-matter jurisdiction, and a remand based on a conclusion that the requirements are not satisfied is a remand for lack of jurisdiction. *See Spielman*, 332 F.3d at 123 (SLUSA completely preempts, and thus confers federal jurisdiction over, only those claims within the scope of its preemption provision).

For that reason, respondents' concession that the Ninth Circuit reaffirmed the reasoning of *Abada* after *Scarborough* and *Kontrick* is telling. *See United Investors*, 360 F.3d at 963-67. The Second Circuit similarly reaffirmed *Spielman* after *Scarborough* and *Kontrick*. *See Dabit*, 395 F.3d at 33-34. *See also Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 948-49 (9th Cir. 2004) (relying on *Abada*); *In re WTC Disaster Site*, 414 F.3d 352, 366 (2d Cir. 2005) (relying on *Spielman*). Respondents – like the Seventh Circuit below – are simply attempting to deflect this

Court's attention away from the clear conflict created by *Kircher I* by contending (Opp. 11) that *Scarborough* and *Kontrick* would alter other circuits' analysis. Nothing in the reasoning or subsequent treatment of the issues in those circuits supports that view.

Respondents' assertion (at 12 n.4) that *Williams* is "entirely consistent" with the decision below has no merit. *Williams* specifically recognized that SLUSA's removal provision made reference to its preemption provision, and held that the district court's remand order was not reviewable because it followed a conclusion that the lawsuit fell outside the scope of the preemption clause. *See* 389 F.3d at 1189. Although *Williams* involved a lawsuit that was not preempted because it arose under federal law, not a lawsuit that was not "in connection with the purchase or sale," *Kircher I* itself recognized the existence of a circuit conflict in such circumstances, *i.e.*, where two courts applied different interpretations of SLUSA's removal provision to non-identical facts. *See* Pet. App. 15a-16a (stating that its holding conflicted with the Ninth Circuit's decision in *United Investors*). The Seventh Circuit presumably regarded the decisions as conflicting because the Ninth Circuit, like the Eleventh, held that SLUSA's preemption and removal provisions are coextensive. The bottom line is that, once the *Williams* court found the plaintiffs' claims not to be preempted under SLUSA, it held the case to be not removable or reviewable on appeal – and that holding cannot be squared with *Kircher I*.

Respondents' argument that the question presented is not important because it affects only securities class actions, not *all* class actions, likewise is unpersuasive. The circuit split over the interpretation of SLUSA's removal provision has a substantial impact on the docket of the federal courts. *See* Pet. 21. The mere fact that the statute concerns removability of one type of lawsuit – albeit a type important enough for Congress to address in a separate statute – is no reason to deny certiorari where a well-recognized circuit conflict exists over construing the Act.

Contrary to respondents' assertion (Opp. 13), passage of the Class Action Fairness Act of 2005 ("CAFA") *increases*, not diminishes the importance of the question whether SLUSA remand orders are subject to appellate review. Respondents concede that CAFA has no effect on securities lawsuits, and the fact that Congress left SLUSA removability in the hands of the courts by exempting securities class actions from CAFA's scope strongly suggests an intent for the Court to resolve conflicts under SLUSA when and if they should arise.

Respondents are also wrong that *Kircher I*'s misinterpretation of SLUSA's removal provision is "entirely consistent" with CAFA's explicit authorization of appellate review of remand orders. Opp. 13. When Congress wanted to permit appellate review of remand orders in the class action context, it did so explicitly, as in CAFA, but not in SLUSA. *See Spielman*, 332 F.3d at 127 ("Conspicuously absent from SLUSA is any express language suggesting that it operates to override the appealability exclusion of Section 1447(d). . . . It is not our place as jurists to supply that which is omitted by the legislature.").

Finally, the pendency of *Dabit* in no way counsels against deciding the jurisdictional question presented. *Dabit* itself does not involve that question. Moreover, whatever *Dabit* decides about preemption of claims brought by holders of securities, the lower courts will face outstanding issues as to whether plaintiffs' claims are "in connection with" purchases or sales. In *Dabit* itself, the plaintiffs asserted claims regarding lost fees that Merrill Lynch argued were "in connection with the purchase or sale" of securities, but that the Second Circuit found were not preempted even under the broad definition of that phrase endorsed by Merrill Lynch. *See* 395 F.3d at 47. Merrill Lynch did not seek review of that holding. The Solicitor General's amicus brief in *Dabit* similarly observes that the case does not call upon the Court to determine the "outer limits" of the "in connection with" requirement. U.S. Br. at 13 n.2, No. 04-1371. If the Court rules in

Dabit's favor, respondents here concede that defendants will likely make many attempts to appeal remand orders that implicate the jurisdictional question presented. *See* Opp. 14. But even if the Court rules for Merrill Lynch, there will still be many disputes regarding the coverage of the "in connection with" language, which will lead to removals, remands based on findings of no preemption, and efforts by defendants to appeal those remand orders. Even putting aside that *Dabit* will not resolve all issues relating to the scope of "in connection with the purchase or sale," disputes over the proper construction of SLUSA's other preemption requirements – *e.g.*, that a claim allege a misrepresentation, omission, or manipulative or deceptive device – will similarly generate attempts to appeal remand orders. Respondents are wrong to suggest that *Dabit* could somehow render the jurisdictional issue moot.

In sum, further percolation on the jurisdictional question presented will not amplify the range of arguments available. The circuits' opposing interpretations of SLUSA's removal provision are well-defined and should be addressed by this Court.[3]

II. *Kircher I* Conflicts With This Court's Precedent

Respondents argue that the decision below is correct because Congress may confer Article III "arising under" jurisdiction even when federal question jurisdiction under 28 U.S.C. § 1331 does not exist, and because Congress may authorize federal courts to adjudicate the merits of federal defenses, as it did in the federal officer removal statute, 28 U.S.C. § 1442. These arguments are irrelevant. Neither addresses the crucial point that SLUSA's removal provi-

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[3] This case is nothing like *McCray v. New York*, 461 U.S. 961 (1983), cited by respondents (at 13), where Justice Stevens suggested further percolation was warranted because "[t]here is presently no conflict of decision within the federal system" and the question presented involved peremptory challenges. 461 U.S. at 962-63 (Stevens, J., respecting denial of certiorari). Such challenges had traditionally been unreviewable, and States had only recently begun to grapple with the procedural and substantive problems posed by judicial review.

sion plainly confers jurisdiction *over only those claims that SLUSA preempts*. The cases cited by respondents only emphasize the need to make a showing that the requirements of a particular removal statute are satisfied before a court may uphold removal and exercise jurisdiction.

Respondents' cases deal with the federal officer removal statute, which allows federal officers to remove to federal court any state-court civil action commenced against them "for any act under color of office." That statute upholds important sovereignty interests not present in SLUSA. In *Jefferson County v. Acker*, 527 U.S. 423 (1999), the Court held that, to qualify for removal, the officer must establish that the suit is "for an act under color of office," *id.* at 431 – just as to qualify for removal under SLUSA a defendant must establish that a lawsuit is a "covered class action . . . as set forth in subsection (b)." The Court found it unnecessary for the officer to prove an "airtight case on the merits" or a "clearly sustainable defense," as opposed to a "colorable defense." *Id.* at 432. The Court reasoned that such a prerequisite would defeat the statute's purpose, which is to have federal courts adjudicate the validity of the defense. Here, by contrast, there is no question of defeating the purpose of SLUSA's removal provision. If the Court agrees with petitioners, federal courts will still determine whether cases are preempted and therefore properly removed. But that does not mean that remand orders are appealable, contrary to the general rule. SLUSA contains a textual requirement that actions must be preempted to be removed. In the consolidated cases below, defendants simply removed the lawsuits and none of the district courts found that they had shown SLUSA preemption.[4]

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[4] *Willingham v. Morgan*, 395 U.S. 402 (1969), is similarly off-point. That case rejected a "narrow, grudging interpretation" of the federal officer removal statute that had no basis in the text, namely, an interpretation that would not permit removal even when an officer did have a valid defense on the merits. *Id.* at 405-07. The Court held that, if the defendant demonstrated a causal connection between the charged conduct and the asserted official activity, this showed the lawsuit was for an act under color of office and warranted removal. *Id.* at 409. *See also*

Respondents go farther than the Seventh Circuit in arguing that, so long as defendants allege SLUSA preemption in a "colorable" fashion, removal is always proper. The Seventh Circuit conceded that, if an action is not a "covered class action," removal is improper. *See* Pet. App. 14a. The Seventh Circuit did not hold that defendants need only make a "colorable" assertion that an action is a covered class action.

III. In The Alternative, The Court Should Hold The Petition For *Dabit*

Even if the Court determines not to grant review of the jurisdictional question presented at this time, it should hold this petition pending resolution of *Dabit*. Respondents offer no reason why this Court should not follow its customary practice of holding petitions raising the same issue as a case on which certiorari has been granted. Instead, they assert that *Kircher II*'s holding that SLUSA does not preempt holder claims was dictum because petitioners would have lost below regardless of how the Seventh Circuit decided the substantive question presented. The Seventh Circuit, however, did not understand its opinion that way. *Kircher II* explained that, because the complaint in the *Spurgeon* case successfully defined a class of holders, "we must answer the question" of whether SLUSA preempts holder claims "rather than postpone its resolution." Pet. App. 7a. *Kircher II* did argue that some of the plaintiffs – those whose purchases occurred during the limitations period – could have brought their claims under Rule 10b-5. *See id.* at 9a. The court thus thought those plaintiffs might have possessed *Blue Chip Stamps* standing had they defined their class and pleaded their claims differently; because they did not, the court found it neces-

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Venezia v. Robinson, 16 F.3d 209, 212 (7th Cir. 1994) (noting that removing party must establish that he is a federal official and that he has a plausible defense, but need not demonstrate that he is entitled to prevail on the federal defense). None of the officer removal cases supports reading SLUSA's removal provision to authorize appeal of remand orders.

sary to resolve the substantive question presented. *See also* Cert. Reply Br. at 2-3, No. 04-1371.

Respondents essentially admit that the Seventh Circuit's ruling was not dictum in arguing that the court's skepticism about whether the consolidated cases involved true holder claims is "dispositive as to all of the complaints *but one*." Opp. 20 (emphasis added). The class definition in *Spurgeon* mandates that the Court hold this petition for *Dabit*. But the market-timing claims in all of the complaints can *only* be brought by holders of securities; market timing simply does not affect purchasers or sellers. The Court's conclusions in *Dabit* thus will affect the proper disposition of the other cases below. For example, the Seventh Circuit contended that the complaints other than that in *Spurgeon* should be dismissed because the plaintiff classes were defined to include investors who held shares between two given dates, as well as possible purchasers or sellers. *See* Pet. App. 6a. The Second Circuit in *Dabit* made clear that, when a class definition includes holders as well as purchasers or sellers, the complaint should be dismissed *without* prejudice, to "allow the plaintiff to plead a claim sounding only in state law if possible." 395 F.3d at 47. Thus, if the Supreme Court agrees with the Second Circuit, the plaintiffs in the cases other than *Spurgeon* should be permitted to amend their complaints.[5]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition pending resolution of *Dabit*.

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[5] On remand from *Kircher II*, petitioners were not permitted to amend their complaints – the courts read *Kircher II* as foreclosing that opportunity.

Respectfully submitted,

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